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ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE UNDER VIRGINIA ACT OF 1916.[1]

An act of the general assembly approved March 21, 1916 (Acts 1916, p. 762), provides, as to steam railroads engaged in intrastate commerce, § 2, "That in all actions or motions hereafter brought against any such common carrier to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee, who may be injured or killed, shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

§ 3. "That in any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury, or death of such employee." This statute is so similar to the Act of Congress of April 22, 1908,[2] regulat-

1. This subject having been recently fully covered by the writer in a volume just published (Richey's Federal Employers' Liability Safety Appliance, and Hours of Service Act, Michie Company, Nov. 1, 1916), much that is therein contained on this subject is here repeated, with its direct application to the Virginia statute.

2. This statute provides, § 3, "That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contribu-

ing employers and employees when engaged in interstate commerce that decisions construing the same are especially applicable to the Virginia act.

Under the rule of the common law, either assumption of risk or contributory negligence on the part of an employee was a complete defense to an action to recover damages for injuries received. For this reason they have often been referred to and discussed by the courts without making any discrimination between them. But to give full effect to such a statute as this; which permits contributory negligence as a partial defense only, and assumption of risk as a complete defense, in cases where applicable, a distinction must necessarily be recognized.

DISTINCTION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.

Assumption of risk sometimes shades into negligence as commonly understood; there is, nevertheless, a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. Contributory negligence, on the other

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tory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4. "That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires.[3] In Seaboard Air Line Railway *v.* Horton, 223 U. S. 492, 28 L. Ed. 1062, 34 S. Ct. 635, 639, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, the court said:

> "The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. * * * When the employee does know of the defect, and appreciates the risk that is attributable to it,

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3. Distinction between contributory negligence and assumption of risk.—Schlemmer *v.* Buffalo, etc., R. Co., 220 U. S. 590, 55 L. Ed. 596, 31 S. Ct. 561.

"Assumption of risk" is a doctrine wholly distinguishable from that of "contributory negligence," which is a breach of a legal duty imposed by law upon the servant, however unwilling or protesting he may be, while assumption of risk is not a duty, but is merely voluntary on the part of the servant. Southern R. Co. *v.* Jacobs, 116 Va. 189, 81 S. E. 99.

> then, if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

This case was reversed and remanded for a failure to charge that if the plaintiff with knowledge that the water gauge of a locomotive boiler was not provided with a guard glass and the condition was open and obvious, and was fully known to the plaintiff and he continued to use such guage, with such knowledge and without objection, and that he knew the risk incident thereto, then he voluntarily assumed the risk and could not recover, but charged that the same facts constituted contributory negligence.[4]

In Southern Ry. Co. *v.* Jacobs,[5] it was contended that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who was injured when attempting to mount an engine with a vessel of water in his hands holding "not over a gallon," was not guilty of assumption of risk defeating a recovery, but only of contributory negligence. But it was held otherwise, in view of the fact that the employee had full knowledge of the situation and he could

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4. Seaboard Air Line Railway *v.* Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

Assumption of risk is not shown where a railroad engineer proceeding with his engine on a lead track, approached or was traversing a railroad yard, noticing some loaded cars on the opposite side, visible to him but becoming more and more shut off as the train proceeded, inquired of the fireman who was on the same side as the cars and in full view, whether they were clear of the track, and was told that they were. Again later asking the fireman if they were clear, he replied that they were not, and jumped from the engine. The engineer then shut off the power and stepped to the left side of the engine where he was injured, and which caused his death. This shows contributory negligence but not assumption of risk. Yazoo, etc., R. Co. *v.* Wright, 235 U. S. 376, 59 L. Ed. 277, 35 S. Ct. 130.

5. 241 U. S. 229, 36 S. Ct. 588, affirming 116 Va. 189, 81 S. E. 99.

not be considered as not having appreciated the danger from the cinder piles because he had forgotten their existence at the time and did not notice them.

Whether an employee may be charged with assumed risk or contributory negligence by continuing in his employment, in reliance upon a promise to repair, in the presence of a danger so imminent that no reasonably prudent person would confront it, is a question upon which the courts differ. In Seaboard, etc., Railroad *v.* Horton[6] the question was not decided, because it was held that, as the court below had charged that it constituted assumption of risk, which was more favorable to defendant than if it had charged that it was contributory negligence, therefore, if error, was one of which it could not complain. The Virginia decisions hold that under such circumstances an employee assumes the risk.[7] In Riverside, etc., Cotton Mills Co. *v.* Carter, 113 Va. 346, 74 S. E. 183, 184, the court said:

> A servant may rely upon the promise of the master to repair defects for a reasonable time, but, if he remains in the service after the expiration of a reasonable time for remedying the defects, he is thereby deemed to have waived his objection and assumed the risk. The question for the jury to determine is not so much whether the repairs were made within a reasonable time as it is whether the time which elapsed between the promise to repair and the injury was sufficient to put the plaintiff upon notice that the defendant did not intend to make the repairs, thereby shifting again to the plaintiff the risk which the master assumed when he made the promise. * * * So far as advised, this precise question has not been directly passed upon by this court. In the case, however, of Wheel Co. *v.* Chalkley, 98 Va. 62-68, 34 S. E. 976, 978, the court says: 'Where the master promises, or gives the servant reasonable ground to infer or believe, that the defect will be repaired, the servant does not assume the risk of an injury caused thereby within such period of time after the promise or assurance as would be reasonably allowed for its performance.' The inference from this language is clear that, if the servant does remain in the service after the expiration of a reasonable time for the master to

6. 239 U. S. 595, 36 S. Ct. 180.

7. Virginia, etc., Wheel Co. *v.* Chalkey, 98 Va. 62, 34 S. E. 976; Riverside, etc., Cotton Mills Co. *v.* Carter, 113 Va. 346, 74 S. E. 183.

fulfill his promise and make the repairs, he thereby again assumes the risk which had shifted to the master by reason of his promise."

OPERATION WHEN STATUTE VIOLATED.

Before taking up the two subjects as separate defenses it is well to observe the provision that is true to both of them; i. e., that they are not available as a defense "in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." When a statute is violated contributing to the injury of the employee, the effect is to abolish the defense of assumption of risk entirely, and the contributory negligence of the employee does not operate to reduce the damages, the entire negligence being placed upon the employer. But it is not to be understood that the simple violation by the carrier of a statute operates of itself to abolish the defenses. As, in order to render the master liable, the violation must have been proximate cause of the injury, so, to abolish these defenses, the violation must have contributed to the injury.[8] In Atchison, etc., R. Co. *v.* Swearingen, 239 U. S. 339, 36 S. Ct. 121, an employee who was on duty over time, while about to do some oiling according to directions, fell from the running board of the pilot of his engine and his leg was cut off, and though there was evidence of negligence, the defendant having pleaded contributory negligence and assumption of risk, it was held error for the court to instruct the jury that if they found the defendant was guilty of violating the hours of service act, "then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt." On this point the court said:

"This instruction was excepted to in the presence of the jury, but the charge was not modified. It was the one instruction

8. Operation, when statute violated.—Atchison, etc., R. Co. *v.* Swearingen, 239 U. S. 339, 36 S. Ct. 121.

specifically directed to the matter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the hours of labor act itself, but the subsequent Employers' Liability Act. * * * The latter has that operation only when the breach of the law contributes to the injury. * * * We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case."

Effect of Assumption of Risk.

Under the federal statute, the defense of assumption of risk is left as at common law, regardless of any state statutory modification.[9] But in an application of the Virginia statute it has not such an extended operation; due to § 162 in the Construction of 1902, abolishing the fellow servant rule, which provides that, "Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby." This provision of the Constitution, together with § 3 of the Act of 1916, operates to confine assumption of risk in practically every case to risks which are ordinarily incident to the employment, and to abolish it in the numerous cases, where it has been held to embrace negligence of the employer in failing to provide a safe place to work or safe appliances, when the employee with knowledge of the same, continues in the employment without notice or complaint to the employer.

Proportionate Recovery for Contributory Negligence.

If the employee is guilty of contributory negligence it does not bar his recovery. In such a case the statutory direction is "that

9. Seaboard, etc., R. Co. *v.* Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L. R. A. 1915C, 1, Am. Cas. 1915B, 475; Southern Ry. Co. *v.* Jacobs, 116 Va. 189, 81 S. E. 99, affirmed in 241 U. S. 229, 36 S. Ct. 588.

the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

The rule as to proportionate damages, permits a recovery, even though the negligence of the employee is equal to or greater than that of the defendant company,[10] or if the defendant was in the slightest degree negligent.[11] In Pennsylvania Co. *v.* Cole, 131 C. C. A. 244. 214, Fed. 498, 950, the court said:

> "Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as matter of law, bar recovery; for, as said in Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172, the direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means that: 'Where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.' To say that plaintiff's negligence equals the combined negligence of plaintiff and defendant is impossible."

The United States Supreme Court, in Norfolk, etc., R. Co. *v.* Earnest,[12] and Grand Trunk, etc., R. Co. *v.* Lindsay,[13] has interpreted this to mean that the defendant is liable, if it is guilty of any causative negligence, no matter how slight in comparison to that of plaintiff, and that the total damages

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10. Proportionate recovery for contributory negligence —Louisville, etc., R. Co. *v.* Wene, 121 C. C. A. 245, 202 Fed. 887; Pennsylvania Co. *v.* Cole, 131 C. C. A. 244, 214 Fed. 948; Southern R. Co. *v.* Hill, 139 Ga. 549, 77 S. E. 803.

11. Anest *v.* Columbia, etc., R. Co. (Wash.), 154 Pac. 1100; Going *v.* Norfolk C. R. Co. (Va.), 89 S. E. 914.

See Arizona Eastern R. Co. *v.* Bryan (Ariz.), 157 Pac. 376, 380, where it is said: "If no defense was pleaded other than contributory negligence in an action based upon the Federal Liability Act, the plaintiff would as a matter of law be entitled to recover a nominal judgment."

12. 229 U. S. 114, 122, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172.

13. 233 U. S. 42, 47, 58 L. Ed. 838, 34 S. Ct. 581, Ann. Cas. 1914C, 168.

should be proportioned between plaintiff and defendant according to their respective fractions of the total negligence.[14] Thus it will be seen that, under these statutes, it is not a question of majority of negligence, but rather one of proportion. Any negligence of the defendant working injury to the plaintiff would therefore entail some damage. For illustration, let us suppose that both parties were equally negligent in the estimation of the jury and that the actual damages of the defendant were properly assessable at $2,000. In such a case the verdict should be for the plaintiff in the sum of $1,000, for the reason that his negligence is one-half of the sum total of all the negligence of both parties.[15]

Possibly this would be more clearly understood and not so confusing in its application were the doctrine of comparative negligence, by which name it is often called, entirely eliminated, as it must be, because this is not comparative negligence. In comparative negligence there may be a point in which the negligence of the employee exceeds that of the employer and prevents a recovery; but in proportionate negligence this is never so, as a part will never equal or exceed the whole, and it is this part of the employee's negligence that is to reduce the damages in the proportion that it bears to the whole negligence. True, the negligence of the parties is compared, but not primarily to determine the damages, but to determine the proportion in which the negligence of each contributed to the total injury and damage, upon the determination of which the plaintiff's recovery is to be reduced accordingly.

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14. New York, etc., R. Co. *v.* Niebel, 131 C. C. A. 248, 214 Fed. 952, 955.

15. Chadwick *v.* Oregon-Washington R., etc., Co., 74 Ore. 19, 144 Pac. 1165, 1169, L. R. A. 1915C, 823.

In Fogarty *v.* Northern Pac. R. Co., 74 Wash. 397, 133 Pac. 609, the court does not seem to have recognized the rule as above laid down, when it is said: "The cases must therefore be rare in which the court would be justified in saying, as a matter of law, that the contributory negligence of the employee so far exceeds the negligence of the employer that the jury would not be justified in returning a verdict in any amount." Because it never defeats a recovery as long as it is contributory. But negligence of the employee, when the sole cause of the injury, defeats a recovery, but such is not contributory negligence as in such a case the defendant is not negligent.

The rule of the Statute is to be followed. Thus, in reversing the lower court for its failure to give effect to the rule as laid down in the statute, and permitting the jury to reduce the amount of damages by whatever amount they thought proper, without naming any standard to which their action should conform, other than their own conception of what was reasonable, in Seaboard Air Line Railway *v.* Tilghman, 237 U. S. 499, 59 L. Ed. 1069, 35 S. Ct. 653, 654, the court said.

> "It means, and can only mean, as this court has held, that, where the casual negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a porportional part of the damages corresponding to the employee's contribution to the total negligence."

CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE OF INJURY.

In order to diminish the recovery the contributory negligence of the plaintiff must have been the proximate cause of his injury;[16] and as under the doctrine of last clear chance the plaintiff is not barred of a recovery, so under this statute he would not suffer any reduction of damages due to his prior negligence.[17]

The common-law principle controlling the right to recover, that is, that in the negligent act of the defendant must be found the proximate cause of the injury, is abrogated in cases coming within the statute, and liability is made to depend upon the question whether such negligent act contributed "in whole or in part" to the injury.[18] That is, if the cause of action is established by showing that the injury resulted in whole or in part from the de-

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16. Contributory negligence as proximate and sole cause of injury. —Raines *v.* Southern R. Co., 169 N. C. 189, 85 S. E. 294; Carter *v.* Kansas, etc., R. Co. (Tex. Civ. App.), 155 S. W. 638.

17. Gray *v.* Southern Ry. Co., 167 N. C. 433, 83 S. E. 849, reversed in 241 U. S. 333, 36 S. Ct. 558, on application of law to facts. See, also, Ellis *v.* Louisville, etc., R. Co., 155 Ky. 745, 160 S. W. 512; Doichinoff *v.* Chicago, etc., R. Co. (Mont.), 154 Pac. 924.

18. When proximate cause not applicable.—Smith *v.* Atlantic, etc., R. Co., 127 C. C. A. 311, 210 Fed. 761, 765.

fendant railway company's negligence, the statute cannot be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury. The plaintiff's negligent act or omission, by whatever name it may be called, is the same act or omission, and it is only when such act or omission on the part of the plaintiff is the sole cause—when the defendant's act is no part of the causation—that the defendant is free from liability under the act.[19]

In Illinois Cent. R. Co. *v.* Skaggs, 240 U. S. 66, 36 S. Ct. 249, 250, the court said:

> "It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. * * * But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury."

The proper construction to put upon the word "contributed," as used, necessarily includes the proposition that the negligence of plaintiff cannot in fact merely contribute to an injury unless there be negligence on the part of defendant also contributing thereto; neither can the negligence of a plaintiff be the sole

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19. Grand Trunk, etc., R. Co. *v.* Lindsay, 233 U. S. 42, 47, 58 L. Ed. 838, 34 S. Ct. 581, Ann. Cas. 1914C, 168, affirming 120 C. C. A. 166, 201 Fed. 836, affirmed in 32 S. Ct. 581; Louisville, etc., R. Co. *v.* Wene, 121 C. C. A. 245, 202 Fed. 887; Smith *v.* Atlantic, etc., R. Co., 127 C. C. A. 311, 210 Fed. 761; Illinois Cent. R. Co. *v.* Porter, 125 C. C. A. 55, 207 Fed. 311, 316; Spokane, etc., R. Co. *v.* Campbell, 133 C. C. A. 370, 217 Fed. 518, affirmed in 36 S. Ct. 683; Nashville, etc., R. Co. *v.* Banks, 156 Ky. 609, 161 S. W. 554; Cincinnati, etc., R. Co. *v.* Goode, 163 Ky. 60, 173 S. W. 329; Otos *v.* Great Northern R. Co., 128 Minn. 283, 150 N. W. 922, affirmed in 36 S. Ct. 124.

The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the statute is a contributing cause of the injury. Otos *v.* Great Northern R. Co., 128 Minn. 283, 150 N. W. 922, affirmed in 36 S. Ct. 126.

cause of an injury, and thus bar recovery, if the negligence of defendant did *contribute* to the injury.[20] This reduces itself to the proposition that to defeat a recovery on the ground of negligence of the plaintiff, such must have been the sole cause of the injury, so that there is no negligence of the defendant to which it is contributory, nor any negligence of the defendant making it liable, as it is only liable for negligence.[21]

Instances in which the plaintiff's negligence has been held to be the sole cause of his injury, are found where a car inspector, required by the rules of the company to protect himself by a flag while inspecting or repairing cars, but failed to do so, and

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20. Term "contributory," presupposes negligence of defendant.—Fletcher *v.* South Dakota Cent. R. Co. (S. Dak.), 155 N. W. 3, 5. See, also, Arizona Eastern R. Co. *v.* Bryan (Ariz.), 157 Pac. 376.

21. Negligence of plaintiff as sole cause.—*United States.*—Illinois Cent. R. Co. *v.* Skaggs 240 U. S. 66, 36 S. Ct. 249; Southern R. Co. *v.* Peters (Ala.), 69 So. 611; Louisville, etc., R. Co. *v.* Heinig, 162 Ky. 14, 171 S. W. 853; Louisville, etc., R. Co. *v.* Winkler, 162 Ky. 843, 173 S. W. 151; Gillis *v* New York, etc., R. Co. (Mass.), 113 N. E. 212; Pankey *v.* Atchison, etc., R. Co., 180 Mo. App. 185, 168 S. W. 274; Trowbridge *v.* Kansas, etc., R. Co. (Mo. App.), 179 S. W. 777; Delano *v.* Roberts (Mo. App.), 182 S. W. 771; Fletcher *v.* South Dakota Cent. R. Co. (S. Dak.), 155 N. W. 3; Virginian R. Co. *v.* Andrews (Va.), 87 S. E. 577, 580. See Central R. Co. *v.* Young, 118 C. C. A. 465, 200 Fed. 45 L. R. A., N. S., 1015, where the employee violated a rule of the company resulting in a collision, which caused his death, the company not being negligent, it was held judgment should have been entered non obstante veredicto.

"Under the Employers' Liability Act, if there was negligence on the part of the defendant, contributory negligence of the deceased does not bar a recovery but only diminishes the damages in proportion to the amount of negligence attributable to such employee. Where, however, there is no negligence on the part of the master, but the injury is solely the result of the employee's negligence, there can be no recovery. That such is the case here we think there can be no doubt. Pankey gave the slow signal and then went from a place of safety and, without notice or intimation to any one, placed himself in an exceedingly dangerous situation [between a track on which the cars were coming and a freight platform]. He was not required to do this in the performance of his work. And, when the danger of his situation evoked a warning from his conductor, he voluntarily chose a dangerous instead of an easier and surely safe way out." Pankey *v.* Atchison, etc., R. Co., 180 Mo. App. 185, 168 S. W. 274, 280.

it was not shown that the defendant violated any duty which it owed to him, or that his perilous situation was discovered in time to have avoided the injury.[22] When a flagman is sent out to watch for trains and warn employees of danger, the company and its trainmen have a right to presume that he will not only watch for trains, but also for his safety, and his failure to do this is his own negligence, and he cannot recover of the company for an injury which he received by reason of his neglect, unless his presence and peril were discovered by those in charge of the train in time to avoid striking him, by the exercise of ordinary care.[23] The negligence of an employee will bar a recovery where he was riding on a hand car and on rounding a curve perceived a train and from fright jumped from the car and was injured; since no other employees acted so, and the section foreman had time to pick up the employee and remove his hand car before the train actually came, showing that there was no real danger.[24] Where the deceased was a rear brakeman on a freight train which broke in two, his neglect to obey the rules of the company, and the signal of the engineer to go back for the purpose of flagging approaching trains, is held to be the sole cause of his death, when he knew a passenger train was close behind, which was not negligently operated.[25]

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22. Instances where employee alone held negligent.—Kentucky, etc., R. Co. *v.* Minton (Ky.), 180 S. W. 831; Wilson *v.* Grand Trunk R. Co. (N. H.), 97 Atl. 981.

23. Southern R. Co. *v.* Gray, 241 U. S. 333, 36 S. Ct. 558; Ellis *v.* Louisville, etc., R. Co., 155 Ky. 745, 160 S. W. 512.

24. Papoutsikis *v.* Spokane, etc., R. Co. (Wash.), 153 Pac. 1053.

25. Great Northern R. Co. *v.* Wiles, 240 U. S. 444, 36 S. Ct. 406, reversing 147 N. W. 427. See, also, Hull *v.* Virginian R. Co. (W. Va.), 88 S. E. 1060, where upon practically the same state of facts, only the rear of the train was left on the main track while the engine was doing switch work, a rear brakeman was held not entitled to a recovery.

In Southern R. Co. *v.* Peters (Ala.), 69 So. 611, 614, on rehearing, it was held that the defendant's negligence in having a rotten floor over which the plaintiff was required to roll coal, was not the proximate cause of an injury to the plaintiff in attempting to lift a coal buggy out of a hole, but that in so doing plaintiff's injury was a result of a subsequent, independent act of his own, the sole proximate cause of his injury. This case can hardly be sustained as, had the floor been in good condition, the buggy would not have fallen

On the other hand, the following cases have been held to constitute contributory negligence. A railroad fireman injured by the neglect of the engineer to obey a signal, and his own contributory negligence in disobeying a rule of the company, and recognized practice of the road, to see that signals were obeyed or ascertain the reason for their disobedience, does not constitute the sole cause of his injury which would defeat a recovery but only contributory negligence diminishing the damages.[26] Plaintiff's failure to obey an order was not the sole proximate cause of his injury in a collision, even though so found by the special verdict of a jury, as such finding was a conclusion of law and not a finding of fact, when they also found that defendant was guilty of negligence in having insufficient air brakes to enable the plaintiff to control the speed of the train.[27] The negligence of an employee in walking on the tracks in a yard is not the sole cause of his death, when the defendant is negligent in failing to display a light on the train or to give a signal by bell or whistle.[28] The negligence of an employee in going between cars to uncouple them, when the automatic couplers refused to work, when there was presented other ways to perform the work, is not the sole cause of a resulting injury but only contributory negligence not constituting a defense.[29] Where an employee signaled an engineer to stop the engine when he observed that the couplers were not in line and, the engineer failing to do so, he attempted to kick the coupler on the engine so as to meet the coupler on the car and in doing so his foot was crushed, the kicking was not the sole cause of the injury as it arose from the failure of the engineer to stop on receiving the signal.[30] The neglect of an employee to flag a rear train is not

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in a hole, the plaintiff would not have had to lift it out, and his injury would not have resulted. So if he was guilty of negligence it was at most contributory.

26. Instances held to constitute contributory negligence.—Pennsylvania Co. *v.* Sheeley, 137 C. C. A. 471, 221 Fed. 901.

27. Spokane, etc., R. Co. *v.* Campbell, 133 C. C. A. 370, 217 Fed. 518, affirmed in 36 S. Ct. 683.

28. Easter *v.* Virginian R. Co. (W. Va.), 86 S. E. 37.

29. Fletcher *v.* South Dakota Cent. R. Co. (S. Dak), 155 N. W. 3.

30. Trowbridge *v.* Kansas, etc., R. Co. (Mo. App.), 179 S. W. 777.

the sole cause of an injury resulting from a rear end collision, when the engineer of the rear train ran past block signals without knowledge of their indicating a clear or blocked track.[31] The case of Louisville, etc., R. Co. *v.* Heinig,[32] was to recover damages under the federal law for the death of a railroad engineer resulting from a collision. It was primarily the duty of the engineer to observe train orders placed in his hands and keep a lookout to avoid collisions. It was also the duty of the conductor under certain conditions to apply the angle cock and stop the train. It was held that, where the conductor failed to perform his duty, there might be a recovery for the engineer's death, although his negligence created the condition which caused his death.[33] And where the deceased was a fireman and ran into an open switch, his failure to observe the danger signal caused by the switch being open and to inform the engineer, was not the sole proximate cause of injuries received by going into the switch and colliding with another train standing on it.[34]

The question of whether or not the contributory negligence was a proximate cause of the injury is usually one of fact for the jury.[35] It cannot be said that an employee in using a water

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31. Hadley *v.* Union Pac. R. Co. (Neb.), 156 N. W. 765.

32. 162 Ky. 14, 171 S. W. 853.

33. Louisville, etc., R. Co. *v.* Winkler, 162 Ky. 843, 173 S. W. 151.

34. Hackney *v.* Missouri, etc., R. Co., 96 Kan. 30, 149 Pac. 421.

35. As question for jury.—Carter *v.* Kansas, etc., R. Co. (Tex. Civ. App.), 155 S. W. 638.

"Counsel for appellee contends that Carter was attempting to perform his duties in a manner prohibited by the rules of the company in making a flying switch; that he thus chose an unsafe method for dong his work; and for that reason he assumed all the risks incident thereto. The rules offered in evidence permit the making of a flying switch when necessary. The determination of when it becomes necessary must, in the nature of things, be left largely to the judgment of the employees. But, if it should be said in this instance that incorporating the car into the train by means of a flying switch was not necessary, there is still another complete answer to appellee's contention. The injury sustained by Carter was not necessarily a result of making a flying switch. He was struck by an open door; and this might have occurred had the switching been done in the usual manner. The car was at the time rolling slowing [slowly] down the track, no faster, probably, than it would have traveled had it been shoved by the en-

gauge without a guard glass, when he could have cut this off and used the gauge cocks, was the proximate cause of his injury, when there was evidence to show that these were not an entirely safe instrumentality because of their liability to clog, and at most the proximate cause of the injury is a question for the jury.[36] But where the negligence of a railroad company consisted of its failure to furnish a proper drawbar which caused the train to break in two, and the employee's negligence consisted in his failure to go back and signal an approaching passenger train, it was not error to direct a judgment notwithstanding a verdict on the theory that the employee's negligence was the proximate cause of the injury and not one of concurrent negligence between himself and the railroad company[37]

INSTRUCTIONS ON DIMINUTION OF DAMAGES.

It is not required that damages be assessed under separate issues, one as to the full amount sustained and the other as to the amount to be deducted therefrom by the answer to the issue of contributory negligence; and where the trial judge has correctly charged the jury in this respect, under the one issue of damages, there is no error.[38] When instructing the jury as to the effect of contributory negligence, the language of the act is not in itself a sufficient instruction[39] but may not be

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gine in the ordinary way. Louisville, etc., R. Co. *v.* Pearson, 97 Ala. 211, 12 So. 176. The fact that Carter was injured while making a running switch in violation of the rules would be no defense unless it be shown that that method of doing the work proximately caused his injury. In this instance, the court could not assume, as a matter of law, that it did." Carter *v.* Kansas, etc., R. Co. (Tex. Civ. App.), 155 S. W. 638, 643.

36. Seaboard, etc., Railway *v.* Horton, 239 U. S. 595, 36 S. Ct. 180.

37. Great Northern R. Co. *v.* Wiles 240 U. S. 444, 36 S. Ct. 406, reversing 125 Minn. 348, 147 N. W. 427.

38. Instructions on diminution of damages—Requiring jury to return separate amounts.—Gray *v.* Southern R. Co., 167 N. C. 433, 83 S. E. 849, reversed on other grounds in 36 S. Ct. 558.

39. Charge in language of statute.—Louisville, etc., R. Co. *v.* Holloway, 163 Ky. 125, 173 S. W. 343; Nashville, etc., Railway *v.* Henry, 158 Ky. 88, 164 S. W. 310.

error.[40] To such an instruction in St. Louis, etc., R. Co. *v.* Brown, 241 U. S. 223, 36 S. Ct. 602, 604, the court said:

> "The instruction given is almost in the identical language of the statute, and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole, instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it."

But the jury is not to be permitted to reduce the amount of damages for contributory negligence to such a sum as they may think proper.[41]

The rule to be followed was laid down in Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172, where it is said:

> "The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee." [42]

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40. St. Louis, etc., R. Co. *v.* Brown, 241 U. S. 223, 36 S. Ct. 602; Southern R. Co. *v.* Hill, 139 Ga. 549, 77 S. E. 803.

41. Reduction not to be of reasonable amount.—Seaboard, etc., Ry. *v.* Tilghman, 237 U. S. 499, 35 S. Ct. 653.

42. Rule of apportionment.—*United States.*—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172; Louisville, etc., R. Co. *v.* Wene, 121 C. C. A. 245, 202 Fed. 887; Pennsylvania Co. *v.* Sheeley, 137 C. C. A. 471, 221 Fed. 901; Louis-

For the guidance of the Pennsylvania courts, where the rule was novel, after reviewing the federal supreme court decision, in Waina *v.* Pennsylvania Co. (Pa.), 96 Atl. 461, it is said:

"In cases of this character, where the evidence justifies a finding that both defendant and plaintiff were guilty of negligence contributing to the accident, the jury should be care-

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ville, etc., R. Co. *v.* Holloway, 163 Ky. 125, 173 S. W. 343; Cincinnati, etc., R. Co. *v.* Goode, 163 Ky. 60, 173 S. W. 329; White *v.* Central Vermont R. Co., 87 Vt. 330, 89 Atl. 618. See, also, Philadelphia, etc., R. Co. *v.* Tucker, 35 App. D. C. 123, under act 1906.

On remanding the case in Cincinnati, etc., R. Co. *v.* Goode, 163 Ky. 60, 173 S. W. 329, it was directed that an instruction supposing the plaintiff to be guilty of contributory negligence "in that event you must reduce the amount of damages you find for him to the extent that you believe from the evidence that his negligence, if any, contributed to said injuries" be changed, so as to read "then you will diminish the damages, if any, awarded him, in proportion to the amount of negligence attributable to the plaintiff, so that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both."

An instruction on contributory negligence which, after pouring out its effect under the federal act, is not erroneous in concluding that if the plaintiff was found guilty, "the damages, if any, shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to the said John G. Holloway by reason thereof. So that the plaintiff will not recover full damages, but only a proportional part, bearing the same relation to the full amount as the negligence attributable to the defendant bears to the entire negligence attributable to both the said Holloway and the defendant." Louisville, etc., R. Co. *v.* Holloway, 168 Ky. 262, 181 S. W. 1126.

An instruction that, "If you find that the decedent, Edward M. Walsh, was guilty of contributory negligence, then the plaintiff will not be entitled to full damages, but you will have to deduct from the plaintiff's full damages such damages as you may find have been suffered by reason of decedent's own negligence (that is, if you find that the plaintiff is entitled to damages, you will have to estimate first how much damages the plaintiff has suffered, and then, if you find that the decedent was guilty of some negligence, you will subtract from the entire damages such proportion as you find was caused on account of the decedent's own negligence)," properly submitted the question of contributory negligence. Walsh *v.* Lake Shore, etc., R. Co., 185 Mich. 177, 151 N. W. 754.

fully instructed concerning the rule of comparative negligence established by the federal statute. It is the duty of the jury first to determine whether or not the defendant was guilty of causal negligence; for, if that issue is determined against the plaintiff, there can be no recovery. If the issue of the defendant's negligence is determined in favor of the plaintiff, then the jury should consider whether or not he, too, was guilty of negligence directly contributing to the happening of the accident, and, if they decide that issue against the plaintiff, then, looking at the combined negligence of the plaintiff and defendant as a whole, and using their best judgment based on the evidence before them, the next material subject for the jury to consider is in what ratio should this combined negligence be distributed between the parties to the accident; in other words, how much, or what proportion, of the whole blame, or fault, should be attributable to each. After this problem is solved, the jury must determine the amount of the damages suffered through the combined negligence, and deduct therefrom a proportion corresponding with the share of negligence charged against the plaintiff, the balance, or a proportion corresponding with the share of negligence charged against the defendant, to be awarded as damages to the plaintiff. We do not mean to say that the method just outlined is the only way in which a jury may proceed to reach its conclusions in the trial of causes involving comparative negligence, but rather simply to indicate an orderly manner for considering and determining such cases."

Also an exemplary instruction on the proportion of damages is found in Gekas *v.* Oregon-Washington R., etc., Co., 75 Ore. 243, 146 Pac. 970, where:

"The court defined negligence and charged the jury that if they found that the plaintiff was negligent himself, and that his own conduct contributed to the injury, provided they found that the company was also negligent, the plaintiff could not recover full damages, but that they should be diminished in proportion to the amount of negligence attributable to the plaintiff, as follows: So that your verdict, when finally agreed upon, will be in proportion to the full compensation as the negligence attributable to defendant bears to the entire negligence attributable to both plaintiff and the defendant; that is to say your first inquiry should be, 'Was the defendant guilty of negligence?' And your second inquiry should be, 'Was the plaintiff guilty of negligence?' And your third inquiry should be, 'In what de-

gree did these causal negligences contribute to the accident?' And I instruct you as a matter of law you must determine what proportion plaintiff contributed to causes that caused the accident. If you find plaintiff's negligence contributed to the extent of one-third of the entire negligence, then the plaintiff's damages would be reduced to one-third. If to the extent of one-half, then his damages would be reduced by one-half; and if to the extent of two-thirds, then his damages would be reduced by two-thirds; and if his negligence was alone the cause of the accident, then, of course, that would wipe out the damages, and your verdict would be in favor of the defendant."[42a]

It is improper to instruct the jury that the damages should be reduced in the proportion that the negligence of the plaintiff compares to the negligence of the defendant. Though such an error was held to have been waived by a failure to point out the defect, and that it was not covered by a general objection, in Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172, the court said:

"But for the use in the second instance of the additional words, 'as compared with the negligence of the defendant,' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.'"[43]

42a. In Waina *v.* Pennsylvania Co. (Pa.), 96 Atl. 461, it is said to be better not to illustrate an instruction on the proportion of damages, but it is not erroneous in telling the jury that in proportioning the negligence, it does not mean that if the negligence is equal there shall be no recovery but that in such a case the plaintiff could recover one-half, and if his negligence was more than half, or greater, the damages would have to be reduced in proportion.

43. Diminution by comparison of negligence of each held error.— Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172, citing Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A., N. S., 44; New York, etc., R. Co. *v.* Niebel, 131 C. C. A. 248, 214 Fed. 952; Cross *v.* Chicago, etc., R. Co., 191 Mo. App. 202, 177 S. W. 1127; Newkirk *v.* Pryor (Mo. App.), 183 S. W. 682, 683; Chadwick *v.* Oregon-Washington R., etc., Co., 74 Ore. 19, 144 Pac. 1165.

"The jury was instructed that, as matter of law, upon the trial record, Niebel was guilty of contributory negligence; but that, under the Employers' Liability Act, his negligence and that of the railroad

Prejudice may not always result from an instruction directing a comparison of negligence to ascertain the damages resulting.[44] As to whether or not the defendant was prejudiced by an instruction on the measure of damages which told the jury that, in case they found the plaintiff guilty of contributory negligence, "then such damages should be diminished by the jury in proportion to the amount of negligence attributable to him, as compared with the negligence, if any, attributable to the defendant," in Cross *v.* Chicago, etc., R. Co., 191 Mo. App. 202, 177 S. W. 1127, the court said:

> "We cannot say the error was not prejudicial, since we have no means of knowing the comparisons of negligence made by the jury. Whether this above instruction would be more favorable to defendant or not depends upon the relative amount of negligence the jury charged against the parties. For instance, suppose the full amount of damages was $2,000, and the jury thought the negligence to be charged to the plaintiff should be stated at 2 and the defendant's at 8. In that case plaintiff's negligence, according to the instruction, would be one-fourth as much as defendant's, while, according to the correct rule, it would be one-fifth of the whole damage. In that event the instruction would be more favorable to defendant than would the correct rule, since,

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(if any) through other employees should be compared, and, if the other negligence was greater than his, a verdict should be rendered for plaintiff; the total actual damages being diminished in proportion to the relative negligence of the two parties. Since the case was tried, the supreme court, in Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 1096, 33 S. Ct. 654, Ann. Cas. 1914C, 172, and Grand Trunk, etc., R. Co. *v.* Lindsay, 233 U. S. 42, 58 L. Ed. 838, 34 S. Ct. 581, has interpreted the act to mean that the defendant is liable, if through other employees it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff, and that the total damages should be proportioned between plaintiff and defendant according to the respective fractions of the total negligence. In so far as the interpretation of the statute by the trial judge was not in accordance with these later decisions, the error was not prejudicial to defendant, and affords no ground for reversal." New York, etc., R. Co. *v.* Niebel, 131 C. C. A. 248, 214 Fed. 952.

44. Prejudice by comparison of negligence.—Pennsylvania Co. *v.* Cole, 131 C. C. A. 244, 214 Fed. 948; Skaggs *v.* Illinois Cent. R. Co., 124 Minn. 503, 145 N. W. 381.

under the instruction, the full damages, $2,000, would be diminished by one-fourth, or $500, leaving plaintiff's verdict to be $1,500, while under the correct rule the $2,000 would be diminished by one-fifth, or $400, leaving the verdict $1,600. But suppose the jury thought the negligence of the plaintiff was 8 and that of the defendant 2, then, under the instruction, plaintiff's negligence would be three-fourths, while, according to the correct rule, it would be four-fifths. In such case, under the instruction, the $2,000 would be diminished by $1,500, leaving $500 as the verdict, while, under the correct rule, the $2,000 would be diminished by $1,600, leaving plaintiff's verdict at only $400. So that it all depends on where the jury places the greater negligence as to whether the instruction as given is favorable or unfavorable to defendant. Hence we cannot say the instruction was harmless."

DAUNIS MCBRIDE.